

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK, *et al.*,

Plaintiffs,

- against -

DEUTSCHE TELEKOM AG, *et al.*,

Defendants.

19 Civ. 5434 (VM) (RWL)

**REPLY MEMORANDUM IN FURTHER SUPPORT OF MOTION OF NON-PARTIES
COMCAST CORPORATION, CHARTER COMMUNICATIONS, INC., AND ALTICE
USA, INC. TO MODIFY THE STIPULATED INTERIM PROTECTIVE ORDER**

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TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|-------------|
| TABLE OF AUTHORITIES | ii |
| ARGUMENT | 1 |
| I. The Stipulated Order Should Be Modified so that Defendants’ In-House Counsel Do Not Have Access to Non-Party Confidential Information | 1 |
| A. Defendants’ Proposed Amendment Does Not Address the Risk of Inadvertent Misuse or Disclosure of Confidential Information | 2 |
| B. Defendants Have Not Shown that They Would Be Prejudiced if Confidential Information is Restricted to Outside Counsel Only | 4 |
| C. The Court Should Adopt the Cable MVNOs’ Proposed Order, Which Follows Typical Protections in Litigated Merger Cases | 5 |
| II. Defendants’ Declarations Confirm that their Employees Should Not Have Access to Non-Party Confidential Information | 6 |
| A. Sprint..... | 6 |
| B. T-Mobile | 8 |
| C. Deutsche Telekom | 9 |
| CONCLUSION..... | 10 |

TABLE OF AUTHORITIES

CASES

| | <u>PAGE(S)</u> |
|---|----------------|
| <i>Brown Bag Software v. Symantec Corp.</i> , 960 F.2d 1465 (9th Cir. 1992) | 1, 2, 4 |
| <i>In re Dental Supplies Antitrust Litig.</i> , 2017 WL 1154995 (E.D.N.Y. Mar. 27, 2017) | 4 |
| <i>F.T.C. v. Advocate Health Care Network</i> , 162 F. Supp. 3d 666 (N.D. Ill. 2016) | 3, 4, 6 |
| <i>F.T.C. v. Sysco Corp.</i> , 83 F. Supp. 3d 1 (D.D.C. 2015) | 6 |
| <i>F.T.C. v. Whole Foods Mkt., Inc.</i> , 2007 WL 2059741 (D.D.C. July 6, 2007) | 6 |
| <i>Intel Corp. v. VIA Techs., Inc.</i> , 198 F.R.D. 525 (N.D. Cal. 2000) | 5 |
| <i>New York v. Microsoft Corp.</i> , 2002 WL 31628220 (D.D.C. Nov. 18, 2002) | 5 |
| <i>Sullivan Mktg., Inc. v. Valassis Commc'ns, Inc.</i> , 1994 WL 177795 (S.D.N.Y. May 5, 1994) | 4, 9 |
| <i>United States v. AB Electrolux</i> , 139 F. Supp. 3d 390 (D.D.C. 2015) | 6 |
| <i>United States v. Aetna Inc.</i> , 2016 WL 8738420 (D.D.C. Sept. 5, 2016) | 4, 6, 7, 9 |
| <i>United States v. Deere & Co.</i> , No. 1:16-cv-08515 (N.D. Ill. Apr. 26, 2017) | 6 |
| <i>United States v. Dentsply Int'l, Inc.</i> , 187 F.R.D. 152 (D. Del. 1999) | 1, 5, 7 |
| <i>United States v. Sungard Data Sys., Inc.</i> , 173 F. Supp. 2d 20 (D.D.C. 2001) | 6 |
| <i>U.S. Steel Corp. v. United States</i> , 730 F.2d 1465 (Fed. Cir. 1984) | 3 |

ARGUMENT

Defendants’ letter response effectively concedes that the Stipulated Order inadequately protects non-parties’ confidential information and requires modification.¹ Yet Defendants’ proposed amendment fails to remedy the deficiencies in the Stipulated Order or to provide adequate assurance concerning the roles of employees who would access non-party Confidential Information. In particular, Defendants propose an improperly narrow definition of “competitive decision-making” that is inconsistent with case law and with the FCC protective order, and still permits *sixteen* of Defendants’ in-house lawyers to access *everything* that non-parties produce—without any showing of necessity. Moreover, the declarations *affirmatively reveal* that it would be inappropriate to permit in-house counsel to access the Cable MVNOs’ Confidential Information. For these reasons, and as shown below, the Court should enter the Cable MVNOs’ proposed order and preclude in-house counsel from access to Confidential Information.²

I. **The Stipulated Order Should Be Modified so that Defendants’ In-House Counsel Do Not Have Access to Non-Party Confidential Information**

Defendants’ employees should be barred from accessing non-party Confidential Information because the risk of inadvertent disclosure of such competitively sensitive information outweighs any conceivable prejudice. *See, e.g., Brown Bag Software v. Symantec Corp.*, 960 F.2d 1465, 1470 (9th Cir. 1992); *United States v. Dentsply Int’l, Inc.*, 187 F.R.D. 152, 158 (D. Del. 1999). Defendants incorrectly state that the Cable MVNOs “offer no evidence that they would be harmed” from disclosure of their Confidential Information to Defendants’

¹ Capitalized terms not otherwise defined have the same meaning as in the moving brief (“Mem.”). Exhibits are attached to the moving (Exs. 1 to 10) and reply (Exs. 11 to 21) declarations of Arthur J. Burke.

² Contrary to Defendants’ assertion, this motion was not procedurally “noncompliant.” Defendants never explain the basis for this claim, but may be intimating that the Cable MVNOs should have sought a pre-motion conference pursuant to Magistrate Judge Lehrburger’s Individual Practices. But Paragraph B(2) of the Stipulated Order expressly required a *motion* to be filed by July 8, 2019—not a request for a pre-motion conference. If the Cable MVNOs had not moved then, they would have risked irreparable injury from disclosure of their Confidential Information to Defendants’ in-house counsel. Defendants’ assertion is also misplaced because this motion was not referred to Judge Lehrburger until July 16, when a general pretrial order of reference was entered. ECF 120.

employees. During the pre-suit merger review, the Cable MVNOs disclosed wide-ranging information related to their mobile wireless and broadband businesses, their negotiations with MNOs, their strategic plans, and other highly sensitive issues, as shown in the moving brief. Mem. 5-6. The risk of misuse or disclosure of such information, even inadvertently, is plain.³

A. Defendants’ Proposed Amendment Does Not Address the Risk of Inadvertent Misuse or Disclosure of Confidential Information

In their opposition, Defendants propose an amendment that would modify the role restriction applicable to their in-house lawyers with access to Confidential Information. This amendment effectively concedes that the role restriction in the current Stipulated Order is facially insufficient because it does not preclude such employees from involvement in “competitive decision-making,” which has been called a “crucial factor” in assessing the risk that information will be (even inadvertently) misused. *Brown Bag*, 960 F.2d at 1470.

Defendants’ proposed amendment, however, does not go nearly far enough. In particular, it defines “competitive decision-making” as “participat[ing] in making decisions or advis[ing] the company regarding formulating or implementing business strategies to compete with the company’s competitors.” ECF 112-1, ¶ E(1)(i). This unduly narrow definition fails to reflect the case law and commercial realities.

Notably, Defendants’ submission—and their narrow proposed definition of competitive decision-making—focuses only on competition between the Cable MVNOs and the Defendants and completely ignores the actual or potential *customer/supplier relationships* between the Cable MVNOs and Defendants. The Cable MVNOs—nascent wireless players—are Defendants’ wholesale customers or potential customers. As explained in the moving brief, the complaint contains allegations about Sprint’s wholesale MVNO agreement with Altice and MVNO

³ Defendants fail to justify why each Defendant could possibly need to provide Confidential Information to *four* in-house lawyers when each Defendant is advised by highly skilled counsel. The sheer number of employees with access magnifies the risk of misuse or disclosure of such information.

negotiations that Sprint conducted with Comcast and Charter. Mem. 5; *see* Am. Compl. (ECF 65) ¶¶ 86-88. Already, during the merger review, the Cable MVNOs have disclosed highly sensitive information related to these topics and to their internal views of MVNO negotiations.

Now, however, Defendants have proposed a “competitive decision-making” standard that focuses entirely on claimed competition and not on relevant customer/supplier arrangements. Under Defendants’ proposal, their in-house counsel who access the Cable MVNOs’ highly sensitive information can simultaneously advise their clients on strategy concerning wholesale relationships—even after reviewing the Cable MVNOs’ key strategic documents regarding wholesale strategies—among other issues where this information would give Defendants an advantage. In sum, Defendants’ amendment provides no assurance that Defendants’ employees will not use or disclose Confidential Information to the Cable MVNOs’ disadvantage.

The relevant legal precedent confirms that the proposed amendment is legally deficient. Courts use the phrase “competitive decision-making” as a “convenient shorthand” for an “inevitably complex inquiry.” *F.T.C. v. Advocate Health Care Network*, 162 F. Supp. 3d 666, 669 (N.D. Ill. 2016). Even in the case on which Defendants principally rely, *U.S. Steel Corp. v. United States*, the court explained that competitive decision-making is simply “shorthand” for “counsel’s *activities, association, and relationship with a client* that are such as to involve counsel’s advice and participation in *any or all of the client’s decisions* . . . made in light of similar or corresponding information about a competitor.” 730 F.2d 1465, 1468 n.3 (Fed. Cir. 1984) (emphasis added). The FCC protective order in this very merger defines “Competitive Decision-Making” far more broadly as “a person’s activities, association, or relationship with any of his or her clients involving advice about or participation in the relevant business decisions or the analysis underlying the relevant business decisions of the client in competition with or in a

business relationship with the Submitting Party or with a Third-Party Interest Holder.”⁴ Ex. 8

¶ 2. Defendants’ unreasonably narrow definition of competitive decision-making falls far short of this applicable standard and should be rejected.

The declarations submitted by three Defendants’ in-house counsel, as explained in Point II below, confirm the acute risk of misuse or disclosure of Confidential Information. Their canned disclaimers of responsibility for “potentially competitively sensitive issues,” Buckland Decl. (ECF 112-2) ¶¶ 6-7; Fell Decl. (ECF 112-3) ¶¶ 5-6; Stapper Decl. (ECF 112-4) ¶ 4, neither address the full range of sensitive matters nor permit “careful and sensitive assessment of the entire setting in which in-house counsel functions.” *Advocate Health*, 162 F. Supp. 3d at 669.

B. Defendants Have Not Shown that They Would Be Prejudiced if Confidential Information is Restricted to Outside Counsel Only

The risk of misuse or disclosure of Confidential Information must be balanced against the prejudice, if any, that Defendants would suffer if their in-house counsel were not able to access such information. *Brown Bag*, 960 F.2d at 1470; *Sullivan Mktg., Inc. v. Valassis Commc’ns, Inc.*, 1994 WL 177795, at *2 (S.D.N.Y. May 5, 1994). Defendants fail to show that their outside counsel would be “hamstrung in their trial preparations” absent input from in-house counsel on Confidential Information or that it is “essential” that in-house counsel pore over the Cable MVNOs’ highly sensitive information. *Advocate Health*, 162 F. Supp. 3d at 672, 674; *see, e.g., In re Dental Supplies Antitrust Litig.*, 2017 WL 1154995, at *4 (E.D.N.Y. Mar. 27, 2017); *United States v. Aetna Inc.*, 2016 WL 8738420, at *9 (D.D.C. Sept. 5, 2016).

⁴ Defendants’ discussion of the FCC protective order is misleading. That order broadly defines “Highly Confidential Information” to include information that the submitting party “claims constitutes some of its most sensitive business data which, if released to competitors or those with whom the Submitting Party . . . does business, would allow those persons to gain a significant advantage in the marketplace or in negotiations.” Ex. 8 ¶ 2. Under the FCC order, no such information can be shared with *any* in-house counsel or even *any outside counsel* who are involved in competitive decision-making. *Id.* ¶ 7. In contrast, Paragraph E(8) of the Stipulated Order provides heightened protection only for the limited category of “NRUF/LNP” data.

The declarations of Defendants’ in-house counsel do not demonstrate otherwise. None provide particularized reasons why it is essential or even particularly important for them to access non-party Confidential Information. Instead, they contain generic statements to the effect that they have “significant experience and knowledge regarding where relevant information can be found to respond to the allegations and arguments by Plaintiffs based in part on Confidential Information.” Buckland Decl. ¶ 10; *see also* Fell Decl. ¶ 8; Stapper Decl. ¶ 6. It is unexplained why in-house counsel require access to *non-parties’* Confidential Information to find relevant information within their own companies. The declarations’ rote claims that these employees “cannot provide fully informed legal advice” absent access to Confidential Information, Buckland Decl. ¶ 11; Fell Decl. ¶ 9; Stapper Decl. ¶ 7, lack particularity and do not disprove Defendants’ ability to prepare for trial without in-house access to Confidential Information.⁵

C. The Court Should Adopt the Cable MVNOs’ Proposed Order, Which Follows Typical Protections in Litigated Merger Cases

The Court should enter the Cable MVNOs’ proposed order, which presumptively prohibits disclosure of Confidential Information to any in-house counsel. Contrary to Defendants’ suggestion, protective orders in other merger cases of similar scope and complexity provide appropriate models. They reflect the burden that the law puts on parties to demonstrate why their in-house counsel should be permitted access to highly sensitive information of others. *See, e.g., Intel Corp. v. VIA Techs., Inc.*, 198 F.R.D. 525, 528 (N.D. Cal. 2000) (the party seeking “disclosure of information that would otherwise be confidential” bears the burden of establishing “sufficient need for the information” which outweighs the risk of inadvertent disclosure); *Dentsply*, 187 F.R.D. at 162 (defendant seeking to disclose confidential information to in-house

⁵ Defendants’ arguments that “fairness” requires in-house counsel to have access to Confidential Information and that a ruling to the contrary would “deprive” Defendants of their “counsel of choice” are misguided. “[F]airness” does not require in-house counsel to have access to highly confidential third-party documents. *New York v. Microsoft Corp.*, 2002 WL 31628220, at *2 (D.D.C. Nov. 18, 2002). And an order barring in-house counsel from accessing certain information will not keep those counsel from representing Defendants.

counsel had to detail “the circumstances warranting disclosure” and explain “why reliance on the representations and opinions of outside counsel would not be adequate”). Indeed, in similar merger cases, courts frequently deny defendants’ applications to allow in-house counsel to access such information. *See, e.g., United States v. Deere & Co.*, No. 1:16-cv-08515 (N.D. Ill. Apr. 26, 2017) (Ex. 11); *Aetna*, 2016 WL 8738420. The Stipulated Order turns the law on its head by *presuming* it is appropriate for in-house counsel to access non-party Confidential Information, rather than requiring Defendants to *demonstrate* need that outweighs harm.⁶

II. Defendants’ Declarations Confirm that their Employees Should Not Have Access to Non-Party Confidential Information

The declarations from three Defendants confirm why this Court should bar disclosure of non-party Confidential Information to Defendants’ employees. As shown above, they are replete with insufficient boilerplate language, which is no basis for access to Confidential Information. *Advocate Health*, 162 F. Supp. 3d at 669 (“[M]erely insisting that one is not ‘involved in competitive decision-making’ cannot pretermit inquiry into the underlying facts or serve as a shibboleth the mere invocation of which permits access to Highly Confidential Information.”). Indeed, they confirm that presumptive disclosure by in-house counsel threatens to inflict significant harm on the Cable MNVOs, and thus support the Cable MVNOs’ proposed order.⁷

A. Sprint

Disclosure of Confidential Information to Sprint’s designated in-house counsel poses significant risks. Declarant Mary Jean Fell has responsibilities for “management/supervision of

⁶ The cases relied upon by Defendants involved inquiries into particular, clearly identified in-house counsel. *See F.T.C. v. Sysco Corp.*, 83 F. Supp. 3d 1 (D.D.C. 2015); *United States v. AB Electrolux*, 139 F. Supp. 3d 390 (D.D.C. 2015); *F.T.C. v. Whole Foods Mkt., Inc.*, 2007 WL 2059741, at *1 (D.D.C. July 6, 2007); *United States v. Sungard Data Sys., Inc.*, 173 F. Supp. 2d 20, 21 (D.D.C. 2001). Thus, they are consistent with the position that Defendants have the burden to show that any particular employee should access non-party Confidential Information.

⁷ The Cable MVNOs reserve their right to bring more particularized challenges to each disclosed individual under processes approved by the Court, if necessary following resolution of this motion. Defendants have not yet responded to the Cable MVNO’s request to meet and confer on many of these employees, and have identified employees not mentioned in the declarations in a piecemeal fashion, including three SoftBank employees today.

litigation and government investigations,” including antitrust matters. Fell Decl. ¶ 4. Fell’s LinkedIn page elaborates that she “manage[s] regulatory approvals associated with mergers and other transactions.” Ex. 12. Providing Fell with access to the Cable MVNOs’ Confidential Information would place her in the highly inappropriate position of advising on strategic transactions that could harm the Cable MVNOs while knowing detailed information about their businesses. Courts have repeatedly recognized that in-house counsel in similar positions present a risk of inadvertent disclosure. *See, e.g., Aetna*, 2016 WL 8738420, at *7 (in-house antitrust lawyer with access to “direct competitors’ information” might “inadvertently disclose such information when advising management regarding future mergers with or against competitors whose information has been disclosed to him”); *Dentsply*, 187 F.R.D. at 161-62 (in-house counsel was involved in competitive decision-making where he participated in acquisitions).

Fell’s colleagues pose even greater risks. Vonya McCann, Senior Vice President for Government Affairs, and Charles McKee, Vice President of Government Affairs, are responsible for “oversight of Sprint’s government affairs efforts at the federal and state levels.” Fell Decl. ¶ 4. McCann develops “Sprint’s regulatory, legislative and public policy positions and advocacy at the state, federal and international levels.” Ex. 13. These responsibilities include advocacy against competitors. For example, in 2011, McCann appeared on C-SPAN to discuss the proposed merger of AT&T and T-Mobile, calling it “illegal” and describing the reasons why it would harm competition.⁸ Likewise, McKee is responsible “for all non-spectrum related regulatory matters before the [FCC]” and “all State Public Service Commission proceedings including . . . merger reviews.” Ex. 14. Their roles inevitably require them to advocate before regulators, frequently against the interests of the Cable MVNOs. Sprint entirely fails to justify allowing government affairs professionals to access to non-party Confidential Information.

⁸ *Communicators with Vonya McCann and Larry Cohen*, C-SPAN (Sept. 14, 2011), <https://www.c-span.org/video/?301503-1/communicators-vonya-mccann-larry-cohen>.

B. T-Mobile

T-Mobile's declaration also illustrates the harm the Cable MVNOs likely will suffer from the Stipulated Order. Laura Buckland, T-Mobile's Senior Vice President for Litigation and IP, "[a]dvises CEO and executive committee leaders on managing legal and business risks." Ex. 9. This direct line of communication to T-Mobile's leaders creates a danger that Buckland's advice—which may be influenced by her knowledge of Confidential Information—will come at the detriment of the Cable MVNOs. Furthermore, as T-Mobile's chief litigation counsel, Buckland is very likely to become involved in litigation against the Cable MVNOs sometime in the future.⁹ Allowing Buckland to access highly sensitive business information about entities she may later oppose in court could seriously disadvantage the Cable MVNOs.

Similarly, disclosure to Melissa Scanlan, Ellen Blanchard, and Bradley Meisser, each of whom reports to Buckland, similarly threatens harm to the Cable MVNOs. Buckland's declaration contains only conclusory statements regarding their lack of participation in competitive decision-making. T-Mobile has not shown a particularized need for their access to confidential information. Furthermore, based on publicly available information about Scanlan and Blanchard, both pose a risk of inadvertent disclosure of Cable MVNOs' Confidential Information. Scanlan, as Vice President of IP and Antitrust, "advise[s] executive team and business owners regarding risk mitigation with an emphasis on intellectual property, antitrust, contractual, and network-related issues." Ex. 15. Likewise, her responsibilities include "advocacy before federal and state antitrust agencies related to corporate deals." *Id.* Through her involvement in contractual and network issues, among others, Scanlan is likely to be involved in business decisions relating to the Cable MVNOs, which have an actual or potential

⁹ For example, Buckland was involved in litigation between T-Mobile and AT&T. In particular, Buckland verified the complaint in *T-Mobile USA, Inc. v. AT&T Mobility LLC*, Case No. 8377-VCG (Del. Ch. Mar. 4, 2013), an action to confirm an arbitration award that T-Mobile won against AT&T. Sprint currently is in IP litigation against Charter, and Buckland likely would become involved in that matter. *Sprint Commc'ns Co. L.P. v. Charter Commc'ns, Inc.*, No. 1:17-cv-1734 (D. Del.).

MVNO arrangement with Sprint or T-Mobile. Blanchard, T-Mobile's Managing Corporate Counsel for eDiscovery, "work[s] with a variety of business segments at T-Mobile in connection with Government inquiries and litigation." Ex. 16. "Government inquiries" include FCC matters and other matters involving strategic or competitive decision-making that may be adverse to the interests of the Cable MVNOs. Further, the Cable MVNOs may have litigations unrelated to this Action against T-Mobile or Sprint. It threatens irreparable harm to the Cable MVNOs for Blanchard to access Confidential Information in this matter and potentially have that information influence her activities in other matters.

C. Deutsche Telekom

Deutsche Telekom's ("DT") declarations similarly demonstrate why the Court should revise the Stipulated Order presumptively to bar disclosure. For example, Volker Stapper, DT's Vice President of International Competition Policy and Projects, plainly should not have access to the Cable MVNOs' Confidential Information. Stapper "advises [DT] on international competition policy," ensuring that competition issues "are appropriately framed and advanced." Ex. 17 at 2-3. As discussed above, in-house counsel involved in competition counseling pose a significant risk of inadvertent disclosure of Confidential Information to the detriment of competitors. *See, e.g., Aetna*, 2016 WL 8738420, at *7; *Sullivan Mktg.*, 1994 WL 177795, at *3 ("[W]here advice on a seemingly legal issue such as an antitrust question is sought, counsel's intimate knowledge of a competitor's [strategies and policies] could surely influence the nature of the advice given."). *Even Sprint itself* objected to the disclosure of confidential information to Stapper in a prior FCC proceeding, because "framing and advancing competition policy" constitute "the very core of Competitive Decision-Making." Ex. 18 at 5. Based on Stapper's position, seniority, and implicit access to high-level decision makers at DT, there is a high risk that Stapper's future advice on competition issues, such as regulatory risks associated with future

transactions in the mobile wireless industry, may be unintentionally influenced by the competitively sensitive information contained in the Cable MVNOs' Confidential Information.

As for Stapper's colleagues, DT provides no information on their roles. But publicly available information confirms that Roman Reuter, Wolfgang Kopf, and Thomas Anderson are involved in competitive decision-making. Reuter, DT's Senior Counsel for International Competition Affairs, presents the same issues as Stapper as he advises DT "on all antitrust related matters" and is "[r]esponsible for antitrust compliance." Ex. 19. Kopf, DT's Senior Vice President for Public and Regulatory Affairs, is responsible for, among other matters "Competition and Media Policy" and "Spectrum Strategy." Ex. 20. Kopf's work has included "market entry in the US and building up the Antitrust and International Regulatory departments at DT." *Id.* Kopf's responsibilities for competition, spectrum strategy, and market entry place him at the forefront of competitive decision-making and should disqualify him from viewing the Confidential Information of the Cable MVNOs, who would be competitively disadvantaged if Kopf's future decisions and advice were influenced by their sensitive information. Finally, Anderson is DT's Associate General Counsel and Regulatory Counsel. His duties include serving as "secretary for various DT group entities." Ex. 21. His implicit access to high-level decision-makers whom he may advise on legal issues necessarily creates a significant risk of inadvertent use or disclosure of Confidential Information.

CONCLUSION

For the foregoing reasons, Defendants' proposed amendment should be rejected, and the Court should enter Cable MVNOs' Proposed Order.

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Respectfully submitted,

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